

Exhibit 61 to Plaintiff's  
Memorandum of Points and Authorities  
in Support of Its Motion for Temporary  
Restraining Order and Preliminary  
Injunction  
(PX01340)  
Cited Portions of the Exhibit are Excerpted

**[PORTIONS REDACTED]**

## FEDERAL TRADE COMMISSION

## I N D E X

WITNESS:

EXAMINATION:

JAMES SUD

BY MR. FRANCHAK

6

EXHIBITS

DESCRIPTION

FOR ID

None

OTHER EXHIBITS REFERENCED

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## FEDERAL TRADE COMMISSION

WHOLE FOODS MARKET, INC., )  
a corporation, )  
and ) File No. 0710114  
WILD OATS MARKETPLACE, INC., )  
a corporation. )  
-----)

Thursday, April 19, 2007

Room 6100  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20580

The above-entitled matter came on for  
investigational hearing, pursuant to notice, at  
8:12 a.m.

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1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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12 ON BEHALF OF WHOLE FOODS MARKET, INC.:

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20 and

21

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23

24

25

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1           ROBERTA LANG, Attorney  
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7  
8

9       ALSO PRESENT:

10           ERIN DWYER-FRAZIER  
11           STEPHANIE REYNOLDS

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1 P R O C E E D I N G S

2 - - - - -

3 Whereupon--

4 JAMES SUD

5 a witness, called for examination, having been first  
6 duly sworn, was examined and testified as follows:

7 EXAMINATION

8 BY MR. FRANCHAK:

9 Q. Mr. Sud, what is your title at Whole Foods  
10 presently?

11 A. Executive vice president of growth and business  
12 development.

13 Q. And you have had that title since '01. Is that  
14 right?

15 A. 2001.

16 Q. 2001. And prior to that, what was your title?

17 A. Chief operating officer.

18 Q. Okay. How long did you hold that title?

19 A. Well, let's see, from '97 until about '99, I was  
20 vice president of operations, and I think I had that  
21 title of chief operating officer about two years.

22 Q. Prior to that, were you with Whole Foods?

23 A. No.

24 Q. What were you doing then?

25 A. I was working in Houston, Texas in the oil and

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1     You're increasing the mix of new stores to existing  
2     stores, the new stores comping at a higher rate than the  
3     older stores, and so you get a boost to your overall  
4     comp.

5           Q.   And I think I recall reading some language that  
6     kind of touches on this a little bit in some of the  
7     scripts that were prepared quarterly for -- I don't know  
8     if it was for the board or for the investors or  
9     something along those lines.  At one point, you were --  
10    you were citing your same-store -- I think it was your  
11    same-store comps, and then at a later point you stopped  
12    doing it because it had -- you know, because it wasn't  
13    apples to apples to some extent.

14           Are you familiar with what I'm referring to?

15           A.   We've always -- we've always -- well, not  
16    always, but for quite some time now we have always  
17    reported comp store sales and identical store sales.  I  
18    can't think of what we have done differently.

19           Q.   I might come back to it later if I can --

20           A.   Okay.

21           Q.   Let's mark this PX00554.  It's an email stream  
22    involving Jim Sud, John Mackey, Walter Robb, and I think  
23    Matt Jonna as well.

24           Please take as much time as you need to review  
25    it.



1           A. (Document review.) Yep.

2           Q. Do you recognize this string of emails?

3           A. Yes.

4           Q. Okay. And here I believe the date is -- or the  
5           dates are roughly March 7th through March 8th. It looks  
6           like at the bottom, Mr. Jonna is sending you an email  
7           saying something about -- I believe in one, two,  
8           three -- the fourth paragraph -- or the fourth sentence  
9           in that paragraph there. The sentence reads, "I was  
10          hoping we could have a gentleman agreement not to locate  
11          so close to one another."

12                  Do you see that?

13          A. Um-hum.

14          Q. Was there any discussion of that sort of thing  
15          at any point that you know of?

16          A. Absolutely not..

17          Q. Okay. In fact, you plan on -- well, let me move  
18          up to the email from Walter Robb to you and John. It  
19          reads, "Unbelievable. Let's get our deal signed and  
20          press on."

21                  In your understanding, was this in reference to  
22          the Oats deal or the Royal Oak --

23          A. The site we were working on, Royal Oaks.

24          Q. Okay, okay. So, here you plan on moving in  
25          directly -- directly next to Plum Market and competing

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1 aggressively for the business there?

2 A. Yes.

3 Q. Okay. And that's something you have done with  
4 Wild Oats on a number of these occasions where there are  
5 competitive openings within close proximity. Is that  
6 also fair to say?

7 A. Yes, we've opened stores in close proximity to  
8 Wild Oats and competed aggressively.

9 Q. Um-hum, um-hum. And if this deal didn't happen,  
10 you plan to continue doing that --

11 A. Yes.

12 Q. -- and you have a number of stores in your  
13 pipeline that would do that?

14 A. Yes.

15 Q. And what happens when you're competing  
16 aggressively in close proximity?

17 A. Well, you know, we -- we try and build the best  
18 store we can that has the broadest customer appeal. We  
19 give customers compelling reasons to shop in our stores.

20 Q. Which could be quality, price, all sorts of  
21 things, correct?

22 A. I'm sure it's everything, yeah.

23 Q. Okay. And part of what's factoring into these  
24 transferred revenues that you're talking about is not  
25 having to have the same sort of direct price competition

1 on a local level if you weren't competing directly with  
2 Wild Oats. Isn't that fair to say?

3 A. No, I wouldn't -- I wouldn't necessarily say  
4 that's -- that's fair to say. I think the truth of the  
5 matter is we -- we feel that we have to be competitive  
6 with all the players in the market. I'm not as close to  
7 it as others in operations, but our -- I can tell you  
8 that globally, our focus is -- is more on the Trader  
9 Joe's of the world and other -- and Wegman's and just  
10 depending on the different regions where we are than  
11 Wild Oats. I mean, it's just not -- they're not that --  
12 I don't think they're who we measure ourselves up  
13 against either in terms of price or quality or  
14 execution.

15 Q. Fair enough, but in these local areas where  
16 you're budgeting for [REDACTED] transferred revenues,  
17 you're not worried in those areas -- you know, say  
18 Evanston, for example -- well, maybe Evanston isn't the  
19 best example. Let's go to the Colorado locations  
20 specifically. I mean, Trader Joe's isn't in Colorado,  
21 correct?

22 A. Correct.

23 Q. And many of these other locations here on  
24 PX00553, there is no Trader Joe's, there is no Wegman's,  
25 correct?

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Redacted

## 1       C E R T I F I C A T I O N     O F     R E P O R T E R

2       DOCKET/FILE NUMBER: 0710114

3       CASE TITLE: WHOLE FOODS and WILD OATS

4       DATE: APRIL 19, 2007

5

6               I HEREBY CERTIFY that the transcript contained  
7       herein is a full and accurate transcript of the notes  
8       taken by me at the hearing on the above cause before the  
9       FEDERAL TRADE COMMISSION to the best of my knowledge and  
10      belief.

11

12                                       DATED: 4/20/2007

13

14

15

16                                       SUSANNE BERGLING, RMR-CLR

17

## 18       C E R T I F I C A T I O N     O F     P R O O F R E A D E R

19

20               I HEREBY CERTIFY that I proofread the transcript  
21       for accuracy in spelling, hyphenation, punctuation and  
22       format.

23

24

25                                       DIANE QUADE

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